

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 23, 2004

IN RE:

PETITION OF BELL SOUTH
TELECOMMUNICATIONS, INC. FOR EXEMPTION OF
CERTAIN SERVICES.

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DOCKET NO.
03-00391

ORDER AMENDING PROCEDURAL SCHEDULE

On June 16, 2003 BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc (collectively "the Petitioners") filed a *Petition for Exemption of Certain Services* (the "*Petition*") in this docket. The Petitioners request exemption from regulation of their intraLATA toll service and primary rate ISDN service. This matter is before the Hearing Officer for consideration of the procedural schedule for the remainder of this Docket.

Background

On January 8, 2004 the Hearing Officer issued the *Order Granting Petition to Intervene and Adopting Procedural Schedule* ("*Order*") The *Order* granted intervention to the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), directed the filing of initial comments regarding the scope of the procedural process necessary to address the Petitioners' request for exemption of intraLATA toll service by January 16, 2004, and the filing of reply comments on or before January 30, 2004. The *Order* also directed the filing of joint or separate proposals regarding a procedural schedule by February 13, 2004.

On January 12, 2004 AT&T Communications of the South Central States, LLC (“AT&T”) filed the *Comments of AT&T Communications of the South Central States, LLC* (“AT&T’s Comments”). On January 16, 2004 the Consumer Advocate filed the *Consumer Advocate and Protection Division’s Initial Comments Regarding the Scope of the Procedural Process Necessary to Address Request for Exemption of IntraLATA Toll Service* (“Consumer Advocate’s Comments”). On January 18, 2004 the Petitioners filed the *Petitioners’ Comments Regarding Exemption from Regulation Regarding IntraLATA Toll Service* (“Petitioners’ Comments”). On January 30, 2004 the Consumer Advocate filed the *Consumer Advocate and Protection Division’s Reply Comments Regarding the Scope of the Procedural Process Necessary to Address Request for Exemption of IntraLATA Toll Service* (“Consumer Advocate’s Reply”) and the Petitioners filed the *Petitioners’ Comments in Response to Comments of Consumer Advocate and Protection Division* (“Petitioners’ Response”) On February 13, 2004 BellSouth filed *BellSouth’s Proposed Procedural Schedule*

Positions of the Parties

AT&T states that it “does not oppose BellSouth’s request for limited deregulation of intraLATA toll rates as long as (1) BellSouth continues to file intraLATA toll tariffs under the time limits applicable to incumbent local exchange carriers and (2) BellSouth’s intraLATA toll service remains subject to all applicable Authority rules and statutes other than the price cap restrictions set forth in T.C.A. § 65-5-209” and states that “these limitations are not materially inconsistent with BellSouth’s requested relief”¹ AT&T states its position as “neutral as to whether BellSouth should be granted relief in this case” and states further that although an

¹ *AT&T’s Comments*, p. 1 (January 12, 2004)

evidentiary hearing is not necessary in this docket, the Authority is obliged to “carefully tailor any relief granted to BellSouth”² AT&T states that while “the intraLATA toll market has progressed to the point that it can be considered open to competition, exemplifying a successful regulatory effort”³ the TRA must retain the “power to suspend, modify, or reject an illegal tariff.”⁴ AT&T states that it does oppose the request outlined in the *Petition* regarding the timing of filing tariffs to the extent that the Petitioners have requested exemption from Authority rules regarding tariff filings including the requirement that such tariffs be filed thirty days in advance⁵

The Consumer Advocate states that the Petitioners should supplement the *Petition*, “if necessary, to fully set forth the factual circumstances and specific grounds that warrant” the exemption from regulation of intraLATA toll service and primary rate ISDN service⁶ The Consumer Advocate also states that it presently lacks sufficient information to proceed and that the parties should be afforded the usual process associated with a contested case including discovery, pre-filed testimony, a live hearing on the merits, and post-hearing briefs⁷

The Petitioners reiterate their position as stated in the *Petition* that intraLATA toll service is “exceedingly competitive today”⁸ and that they “do not seek an exemption permitting them to offer below-cost intraLATA toll service”⁹ The Petitioners state that fashioning an order to provide the requested relief while at the same time preventing them from offering below-cost pricing “is simply a matter for legal word-smithing” and that such an order could be developed

² *AT&T's Comments*, pp 3-4 (January 12, 2004)

³ *AT&T's Comments*, p 4 (January 12, 2004)

⁴ *AT&T's Comments*, p 5 (January 12, 2004)

⁵ *AT&T's Comments*, p 5 (January 12, 2004)

⁶ *Consumer Advocate's Comments*, p 1 (January 16, 2004)

⁷ *Consumer Advocate's Comments*, pp 1-2 (January 16, 2004)

⁸ *Petitioners' Comments*, p 1 (January 18, 2004)

⁹ *Petitioners' Comments*, p 2 (January 18, 2004)

by reviewing proposed orders submitted by the parties¹⁰ The Petitioners state that while they believe “no evidentiary process is needed” they are nevertheless prepared to proceed with discovery and an evidentiary hearing ”¹¹ The Petitioners further suggest that if the parties can stipulate the competitive nature of intraLATA toll service, then they could submit proposed orders together with explanatory briefs in a “paper hearing” with a focus on the requested exemption They suggest this paper hearing could substitute for a live hearing on the merits wherein the parties would be “unnecessarily debating the facts about the competitive nature of intraLATA toll service in Tennessee ”¹²

Discussion

The voting panel assigned to this Docket has exercised its discretion to convene a contested case in this matter.¹³ Authority Rules do not define the term “contested case” but do state that the terms used in Chapter 1220-1-2 regarding contested cases “will have the meanings given them in the Uniform Administrative Procedures Act ”¹⁴

The Uniform Administrative Procedures Act (“UAPA”) defines “contested case” as “a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing ”¹⁵ Tenn Code Ann. § 65-5-208(b) states

The Authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part Upon making such a finding, the Authority may exempt telecommunications service providers from such requirements as appropriate. The Authority shall in any event exempt a telecommunications service for

¹⁰ *Petitioners’ Comments*, p 3 (January 18, 2004)

¹¹ *Petitioners’ Comments*, p 3 (January 18, 2004) *See also Petitioners’ Response*, p 1 (January 30, 2004)

¹² *Petitioners’ Comments*, p 3 (January 18, 2004)

¹³ *Order Convening a Contested Case Proceeding and Appointing a Hearing Officer*, p 1 (September 29, 2003)

¹⁴ Tenn Comp R & Regs 1220-1-2- 01(1)

¹⁵ Tenn Code Ann § 4-5-102(3)

which existing and potential competition is an effective regulator of the price of those services.

The Petitioners have asked that their rights and duties pursuant to Tenn Code Ann § 65-5-208(b) be determined such that they be exempted from regulation of their intraLATA toll service and primary rate ISDN service. Together the UAPA and Tenn Code Ann § 65-5-208(b) provide the parties to this case the right to an opportunity for a hearing

Neither Authority rules nor the UAPA define the term “hearing.” However, Authority rules provide that the Hearing Officer may exercise general procedural powers to determine that there is no genuine issue as to any material fact in a contested case and that such a determination may be reached as to all or any part of a contested case without oral testimony¹⁶ Authority Rules also state that before exercising such powers, the parties to a case shall be afforded reasonable notice and opportunity to be heard.¹⁷

AT&T has stated its position that no evidentiary hearing is necessary¹⁸ regarding the level of competition in Tennessee in the provision of intraLATA toll service but has also suggested that it takes no position on whether a hearing is needed to address other issues.¹⁹ AT&T notes that the Petitioners’ request marks “the first time that a carrier has sought relief pursuant to” Tenn Code Ann. § 65-5-208(b) and that “the Authority should proceed carefully in spelling out precisely what burden of proof the carrier must meet and the parameters of the relief granted.”²⁰

The Consumer Advocate has requested the opportunity to conduct this docket as most contested cases are conducted including discovery, pre-filed testimony, a live hearing before the

¹⁶ Tenn Comp R & Regs 1220-1-2- 22(1)

¹⁷ Tenn Comp R & Regs 1220-1-2- 22(3)

¹⁸ *AT&T's Comments*, p 3 (January 12, 2004)

¹⁹ *AT&T's Comments*, p 4 n 3 (January 12, 2004)

²⁰ *AT&T's Comments*, p 3 (January 12, 2004)

panel, and post-hearing briefs²¹ The Consumer Advocate has articulated a basis for its request by pointing to Authority rules and state law which provide that the parties be afforded an opportunity for a hearing and also point to the current absence in the record of the particular factual circumstances and other specific grounds which would justify the relief requested in the *Petition*.

No party has suggested that conducting discovery and a live hearing before the panel would impede the just, efficient and economical disposition of this case. Both the Consumer Advocate and AT&T have suggested that more facts are needed to ready this case for a decision on the merits to the extent that AT&T has raised an issue regarding the “burden of proof the carrier must meet” and the Consumer Advocate has stated that the *Petition* should be supplemented, if necessary, alleging additional “factual circumstances and specific grounds”²² to justify the requested relief.

The Petitioners have stated that, although they deem it unnecessary, they are presently prepared to proceed with discovery and an evidentiary hearing.²³ Further, they have submitted a proposed procedural schedule providing for discovery, pre-filed testimony and a live hearing before the panel and have stated that no party objects to the proposed schedule. No other party has submitted specific proposals regarding a procedural schedule.

Based on the foregoing, the Hearing Officer finds that *BellSouth's Proposed Procedural Schedule* is well taken and should be adopted as set forth below.

²¹ *Consumer Advocate's Comments*, pp. 1-2 (January 16, 2004)

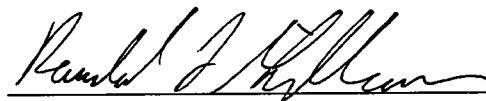
²² *Consumer Advocate's Comments*, p. 1 (January 16, 2004)

²³ *Petitioner's Comments*, p. 3 (January 18, 2004) See also *Petitioner's Response*, p. 1 (January 30, 2004)

IT IS THEREFORE ORDERED THAT:

The following procedural schedule is hereby adopted for the remainder of this Docket:

April 5, 2004	first round discovery requests served
April 16, 2004	proposed protective order(s) filed
April 19, 2004	responses to first round discovery requests served
April 27, 2004	second round discovery requests served together with any motion(s) to compel responses to first discovery requests
May 10, 2004	responses to second round discovery requests served
May 14, 2004	responses filed pursuant to any order granting a motion to compel
May 28, 2004	direct testimony filed
June 11, 2004	rebuttal testimony filed
June 22, 2004	9.00 a m., hearing before the Panel
July 16, 2004	post hearing briefs and parties' proposal for procedural schedule for PRI exemption filed


Randal L. Gilliam, Hearing Officer